IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 72-57

JOHN L. ZELKER, Superintendent, Green Haven Correctional Facility, Stormville, New York,

Petitioner,

against

GUSTAVO LOPEZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RESPONSE NOT PRINTED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. _____

JOHN L. ZELKER, Superintendent, Green Haven Correctional Facility, Stormville, New York,

Petitioner,

against

GUSTAVO LOPEZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, the Superintendent of Green Haven Correctional Facility, Stormville, New York, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the case of *United States of America ex rel. Gustavo Lopez* v. *John L. Zelker*. The judgment was entered on August 17, 1972. On September 8, 1972 the Court of Appeals granted a motion to stay its mandate provided that the instant petition was filed within thirty days therefrom.

Opinions Below

The Court of Appeals wrote no opinion. A copy of its order affirming the District Court is annexed hereto as

Appendix "A". The opinion of the United States District Court for the Southern District of New York is not yet reported. It is reproduced as Appendix "B" to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on August 17, 1972. The order staying the mandate was entered on September 8, 1972. A copy of that order is reproduced as Appendix "C" to this petition.

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Questions Presented

1. Whether respondent's statement, made immediately following his arrest on a fugitive warrant and after waiver of his right to counsel following receipt of the warnings mandated by *Miranda* v. *Arizona*, 384 U.S. 436 (1966) was inadmissible at his State trial because, while a fugitive, he had been indicted.

2. Whether, after a defendant has been indicted, and before counsel has appeared, the attendance of counsel during interrogation can be waived only in the presence of counsel.

3. Whether, if there was error, a reading of the record and application of the appropriate standard, would demonstrate that error to be harmful.

Statement of the Case

Respondent is presently serving a sentence of from 25 years to life in prison for the crime of murder in the second degree. He was convicted on January 23, 1969 follow-

ing a jury trial in New York County, New York. The judgment of conviction was affirmed by the Appellate Division (*People* v. *Lopez*, 33 A.D.2d 733 [1st Dept. 1969]) and by the New York Court of Appeals (28 N.Y.2d 23 [1971]). The majority and dissenting opinions of the New York Court of Appeals are reproduced as Appendix "D" herein. Certiorari was denied by this Court (*Lopez* v. *New York*, 404 U.S. 840 [1971]).

Respondent next sought habeas corpus in the United States District Court for the Southern District of New York claiming that his judgment of conviction was the result of the use of statements obtained "during custodial interrogation conducted subsequent to his indictment for murder in the first degree, during which interrogation he was without the assistance of counsel contrary to his rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution".

In the early morning hours of June 16, 1967, respondent fatally shot one Michael Descartes. Later that same day he fled to California and then to Mexico. As a result of the investigation conducted in his voluntary absence, respondent was indicted for murder in the first degree on July 24, 1967; a bench warrant was issued the next day. On December 1, 1967, a federal warrant was issued charging "unlawful flight to avoid prosecution for the crime of murder". On April 18, 1968, at about 11:30 a.m. respondent was arrested on the federal warrant outside an apartment house in Queens by F.B.I. Special Agent Donald E. Bullard of the Fugitive Squad to whom he subsequently made the challenged admissions. Lopez has never denied the shooting, only the reason for it.

When arrested, Lopez was told who the arresting officers were; he was told that he need not make any statement, that any statement he made could be used against him and that he had a right to an attorney. He was then taken to F.B.I. headquarters in Manhattan where he was fingerprinted and interviewed.

Before Lopez was asked any questions he was again told who the officers were and was read a "standard form" adivsing him of his four-fold rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). He then was given the form, asked to read it, asked if he understood it and, if he did, to sign it if he wished. He read it, signed it and indicated that he understood it. At the time the arrest was made, Agent Bullard knew that a warrant had been issued and had a request from the New York County District Attorney to locate respondent "who was charged, I believe,—this letter requested, indicated there was an indictment for murder". The agent did not recall whether or not he ever advised petitioner that he had been indicted on a charge of murder.

The agents "asked Mr. Lopez if he would like to make any statement regarding the crime he is charged with, and he told us the story".

Lopez told the agents that in June, 1967 he was periodically dating and living with Ida Soba with whom he had a falling out. One night he went to the Shelton Towers Club where he met Miss Soba; he knew that she frequented the club but did not know that she would be there that night. A man came up and started to fight with them. Lopez drew a gun and hit the man across the head; the man backed off and reached for his pocket. Thinking that a gun was about to be drawn, Lopez fired. He ran from the club, down the stairs, returned home, broke down the gun and threw it over the Triborough Bridge. He and his wife Vickie went to California and then to Mexico.

The agents took notes during the interview, but when they afterwards asked Lopez if he would sign a written version of his oral statement, he declined to do so. The interview took about an hour. At no time did respondent request an attorney. He was neither threatened nor harmed in any way. Lopez then was advised of his rights by an Assistant United States Attorney and arraigned on

the federal charge before a United States Commissioner. The charge was dismissed and petitioner was taken into custody by local detectives.

A pre-trial hearing was held on the admissibility of the statement after which the Court held that "the People have proven beyond a reasonable doubt that the defendant intelligently understood the warnings and knowingly expressed his wavier of his constitutional rights . . ."

At trial, the principal evidence against Lopez was the eyewitness testimony of Miss Soba who denied that the deceased had gone for his pocket, the testimony of Lopez' common-law wife to whom he had confessed when he went home and who had been told by him that Lopez had had an encounter with the deceased after which he had gone to his car, fetched the gun and returned, and ballistics evidence contradicting the story that Lopez had fired only once and that he had thrown the gun away since part of a gun seized from his home proved to be the murder weapon. The F.B.I. agent testified as to the statement Lopez had made to him.

Lopez testified in his own defense saying, as he had to the agent and his wife, that the shooting had been self-defense. The only conflict between any part of the statement to the agent and the trial testimony concerned what Lopez did with the gun. He told the agent he threw it off a bridge. His wife said she saw him leave it, dismantled, at home. On direct examination Lopez said he dismantled and left it; on cross-examination he insisted he had thrown it away.

At no time on cross-examination did the district attorney attempt to impeach Lopez with his statement to the Agent.

In summation, the District Attorney pointed out that Lopez told conflicting stories "from what he told Bullard the F.B.I. man and what he told Vicky his wife and what

he told us the first day and what he told us the second day". Specifically he pointed out that Lopez had not reported that, during the altercation, Nancy had called out "kill him" either to Bullard *or* to Vicky but did say it at trial. These were the only two mentions of the agent's name in a fifty page summation.

The New York Court of Appeals affirmed the judgment of conviction by a vote of 4-3. Judge Bergan, writing for the majority, stated that the finding of the trial court that respondent had waived his rights with respect to the Bullard statement was supported by the record and that:

> "Defendant does not dispute either the waiver or the sufficiency of the evidence to find that it was intelligently and understandingly made. His argument is, rather, that because he had been indicted when arrested 'his waiver was not valid'; and therefore his admission to the Federal officer was inadmissible."

Citing *People* v. *Waterman*, 9 N.Y.2d 561 (1961), the majority stated that it had been held that a post-indictment, pre-arraignment statement taken in the absence of counsel was inadmissible and that *Massiah* v. *United States*, 377 U.S. 201 (1964), *McLeod* v. *Ohio*, 381 U.S. 356 (1965), *Spano* v. *New York*, 360 U.S. 315 (1959) and other State cases were "broadly consistent" with this principle.

But the Court pointed out that New York "cases upholding the rule that after indictment a defendant may not be questioned without counsel do not decide the question whether the right may be knowingly and intelligently waived" and relied on *People* v. *Bodie*, 16 N.Y.2d 275 (1965), which found a valid oral waiver after the filing of an information:

> "Indeed, the commencement of a criminal proceeding by information and by indictment are logically indistinguishable as far as waiver of counsel is concerned.

The rational distinction is between this and the situation where, after arraignment, counsel has actually appeared. It has been held that right to counsel may be expressly and knowingly waived at the trial itself."

The opinion noted that Lopez:

". . . was not advised that he had been indicted when the waiver was executed. If this were a willful concealment it might be considered as u: lermining the validity of a waiver. But there is no suggestion of that here, and although the Federal officer knew at the time of the interview that defendant had been indicted, he did not recall whether or not he had advised defendant of this."

Finding that no prejudice had resulted, and that there had been no misrepresentation as to the origin of the prosecution, the Court affirmed the judgment of conviction.

Joined by Chief Judge Fuld and by Judge Burke, Judge Breitel dissented regarding the case as:

"another in which the court backtracks on its principle to the effect that a defendant in a pending criminal action is entitled to the advice of a lawyer and that the right may not be waived except in the presence and with the acquiescence of counsel. To be distinguished is the investigative interrogation of a suspect before a criminal action is instituted with respect to which the Supreme Court imposed its mandate (*Miranda* v. *Arizona*, 384 U.S. 436)."

Miranda was only one of two federal cases cited by the dissent as it developed the history, in New York, of the right to counsel and the manner in which it could be waived.

Petitioner then applied for a writ of habeas corpus. The United States District Court for the Southern District of New York (FRANKEL, J.) said that "This court holds that the conclusion of the dissent in the New York Court of Appeals must be adopted as a master of federal constitutional law— . . ." and that respondent's Sixth Amendment right to counsel was violated by the use of the statement to Bullard because the principle of *Massiah* v. *United States*, 377 U.S. 201 (1964):

> "forbids use at trial of statements elicited from an indicted defendant in the absence of his counsel"

finding that the statement here had been "elicited".

Judge Frankel rejected the argument that the right to counsel had been waived regarding delivery of the *Miranda* warnings as a "brisk ritual" and as "casual and relatively perfunctory". He assumed, but expressed doubt, that the *Massiah* protection may be waived and said that, in any event, a waiver "requires the clearest and most explicit explanation and understanding of what is being given up" because it is clear that the case will, indeed, go forward.

In any event, Judge Frankel held, "if a swift and uncounselled waiver could ever be allowed, the one here would remain ineffectual" because Lopez did not know that he had been indicted for first degree murder. And, Judge Frankel held, "[w]ith deference to the New York Court of Appeals majority, it was of no moment that failure to mention the indictment was not 'wilfull concealment'."

Finally, the Court rejected the argument that any error was harmless saying that "none of the 13 state judges concerned with the case has suggested it as a point worth considering", that the prosecutor decided to use it and must have had a good reason and that, given the only eyewitness' "assailable credibility" and the "sordid" circumstances "it was a potent tactic to nail petitioner's story at the time of

apprehension, with the august auspices of an F.B.I. agent, and then score the defense for petitioner's many contradictions of that story on the witness stand".

Judge Frankel gave one example of the impeachment by contradiction of Bullard's statement; not from the trial, but from the summation—an example not of contradiction but of omission, in which the prosecutor pointed out that not only was the trial statement not made to Bullard, it was not made to Vicky. Judge Frankel regarded it as a "plausible argument" (albeit not made to him), that but for Bullard's statement, Lopez would not have testified at all.

The Court of Appeals, without itself reading the trial record, summarily affirmed the District Court.

Reasons for Granting the Writ

1. The holding below that the standard for assessing a waiver of the right to counsel during police interrogation depends upon whether or not there has been an indictment is in conflict with many decisions of this Court.

The basis for the decision below is that respondent's waiver of the presence of counsel at his interview with F.B.I. Agent Bullard was not valid because, after indictment, his right to counsel at such an interview was of an unspecified higher quality than his right to counsel during pre-trial custodial interrogation. The fact that the mandate of this Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966) had been strictly observed was held not to be sufficient to satisfy the earlier mandate of *Massiah* v. *United States*, 377 U.S. 201 (1964). That result announces an application of *Massiah* far beyond the opinion of this Court therein. Nothing there was intended to bar or can be construed as barring the introduction of statements such as

made by respondent after he was advised of his rights under the procedure dictated in *Miranda*.

The clear import of the result below is that the pre-indictment right to counsel at interrogation is a watered-down version of the post-indictment right. Such a result runs directly counter to those cases which have extended an unfettered right to counsel at interrogation. *Miranda* v. *Arizona, supra; Escobedo* v. *Illinois*, 378 U.S. 478 (1968). Whether the right primarily at issue is the Fifth Amendment privilege against self-incrimination or the Sixth Amendment right to counsel, it is the right to counsel which is involved: it must be accorded under the same circumstances. See *Kirby* v. *Illinois*, 406 U.S. 682 (1972). It may be waived under the same circumstances.

In *United States* v. *Wade*, 388 U.S. 218, 226 (1966), this Court noted that in *Miranda* "the rules established for custodial interrogation included the right to the presence of counsel". The essential principle governing the right to have counsel present at any pre-trial procedure is to insure that the accused "need not stand alone against the State at any stage of the prosecution . . . where counsel's absence might derogate from the accused's right to a fair trial". *United States* v. *Wade, supra* at 226-27. Accordingly, "[i]t would exalt form over substance to make the right to counsel . . . depend on whether at the time of the interrogation, the authorities had secured a formal indictment". *Escobedo* v. *Illinois, supra* at 486. Similarly, the fact that an indictment has issued should not alter the standards of waiver of counsel should the accused wish voluntarily to offer incriminating testimony to the police.

Respondent knew that he had a right to an attorney. He waived the presence of an attorney. If the pre-indictment right to counsel is not to be vitiated, it cannot be denigrated by the wholly artificial distinction drawn by the courts below.

2. The result below is in conflict with the decisions of other federal courts of appeals.

The decision below conflicts with decisions in at least three other circuits. Thus in *United States* v. *Crisp*, 435 F. 2d 354 (7th Cir. 1970) the Court held:

> "*Massiah* and *McLeod* must be read in light of the Supreme Court's subsequent decision in *Miranda* v. *Arizona*, 384 U.S. 436, 475 . . . which expressly recognized the validity of a knowing and voluntary waiver of rights during the 'critical stage' of custodial interrogation . . . As *Miranda* and *Escobedo* clearly indicate, formal indictment is no longer the determinative event upon which constitutional safeguards hinge. By the same token, formal indictment does not absolutize constitutional rights or inexorably rigidify adversary postures. The crucial feature of both *Massiah* and *McLeod* was the deliberate acquisition of information by police from a suspect under circumstances preventing his effective exercise or waiver of his rights to counsel at a time when those rights had clearly attached by virtue of his formal indictment." *United States* v. *Crisp*, *supra* at 358.

While it is true that Crisp asked to see the agents with whom he spoke, he also refused to sign the very waiver form signed by respondent here, and, in any event, the rationale of *Crisp* plainly is not limited to cases in which the defendant asks to see an officer. See also *United States* v. *Kress*, 446 F. 2d 358 (9th Cir. 1971); *United States* v. *Cassell*, 440 F. 2d 569 (7th Cir. 1971); *United States* v. *DeLoy*, 421 F. 2d 900, 902 (5th Cir. 1970). *Cf. United States ex rel. O'Conner* v. *New Jersey*, 405 F. 2d 632 (3rd Cir. 1969), *cert. den.* 395 U.S. 923.

Even the Court below stated in *United States* v. *Drummond*, 354 F. 2d 132, 150 (2d Cir. 1965) (*en banc*), *cert.*

den. 384 U.S. 1013 (1966):

> "We are not prepared to hold that Drummond's willingness to go on 'spilling the beans' was a waiver of some of his rights but not others. The Fifth and Sixth Amendments may be designed to protect quite different values but in concrete situations they may often provide precisely the same protection which can be waived in precisely the same way. . . . Drummond could have refused to talk . . . ; he would have been protected in such a refusal by the Fifth and Sixth Amendments. But when he *did* elect to speak, his rights under both Amendments were waived."

United States v. *DeLoy, supra,* directly posed the issue of the extent to which *Massiah* affected the admissibility of post-indictment confession. Having been given his *Miranda* warnings, the defendant voluntarily signed the waiver form and offered his admissions. The statements were held admissible since they were "voluntarily and deliberately made by a properly warned defendant who was not tricked into speaking by some deliberate act of the investigating officers" 421 F. 2d at 902. See also, *Arrington* v. *Maxwell,* 409 F. 2d 849 (7th Cir. 1969); *Reinke* v. *United States,* 405 F. 2d 228 (9th Cir. 1968). Although in each of these cases the statement was unsolicited, the crucial fact is that the *Miranda* warnings were sufficient to validate waiver of a *Massiah* right. Even in cases in which counsel has already been appointed, waiver of his presence may be accomplished in his absence. *United States* v. *Kress, supra.*

3. The result below conflicts with the decision of the New York Court of Appeals and adopts, as a constitutional rule, a State rule held not applicable to this case.

The District Court held that "the conclusion of the dissent in the New York Court of Appeals must be adopted as a matter of federal constitutional law—". That con-

clusion was drawn exclusively from a line of New York cases which had developed the rule that the right to counsel may, under certain circumstances be waived only in the presence of counsel. The majority of the New York Court of Appeals had already held that rule inapplicable here. The imposition of a State dissenting opinion on the State and on the federal courts should be done, if at all, only by this Court. Certainly rule-making for the States is not a function of federal habeas corpus courts. See *Milton* v. *Wainwright*, 407 U.S. 371 (1972).

4. The holding below that introduction of respondent's statement was not harmless error was based on factors totally extraneous to a proper inquiry and in conflict with standards established by this Court for such inquiries.

Under the decisions of this Court in *Milton* v. *Wainwright*, 407 U.S. 371 (1972); *Schneble* v. *Florida*, 405 U.S. 427 (1972); *Harrington* v. *California*, 395 U.S. 250 (1969) and *Chapman* v. *California*, 386 U.S. 18 (1967) if any error was committed at respondent's trial, it was completely harmless.

Agent Bullard was the final prosecution witness. He testified after the eyewitness, Nancy Soba, testified; he testified that Carmen Virruet had told the court what Lopez had told her about the shooting and what she knew of her own knowledge; he testified after the medical and ballistics evidence substantially confirmed their testimony. And he did not testify to a great deal. Essentially he was told that the deceased had started the fight, that Lopez had hit him with a gun and then, thinking that Descartes was about to draw, had shot him, gone home, dismantled the gun and thrown it off the Triborough Bridge.

As evidence that Lopez had done the shooting, the statement to Bullard was unnecessary. As evidence of criminal intent it was worthless; the statement to his wife that he

had gone for the gun and returned to the club was far more damaging. Although introduced on the direct case, its only possible value was in impeaching respondent's credibility on detail, as to which it was admissible in any event (see *Harris* v. *New York*, 401 U.S. 222 [1971]).*

The other reasons advanced by the District Court for rejecting the harmless error argument have no place in such an inquiry. Having rejected the opinion of 10 state Court judges and adopted the conclusion of 3 with respect to the admissibility of the statement, the Court relied on the silence of all 13 on the issue of harmless error as a reason to reject it. Whether the state courts discuss such an issue or not, is a matter for their decision in considering the facts, the law and their supervisory powers. The issue cannot properly be raised anew on collateral attack in a federal forum.

The District Court also regarded it as "plausible" that the agent's testimony forced respondent to take the stand citing *Harrison* v. *United States*, 392 U.S. 219 (1968). The record refutes the notion. If it was Bullard that forced respondent to take the stand, he would have contradicted that statement; he did not. Bullard's evidence was the least damaging to him. What required explanation was the ballistics evidence and his wife's evidence. What required assailing was the character of the deceased and of the eyewitness. Without Bullard's statement, the case against

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* The District Court's assertion that the prosecutor "relied heavily" on the Bullard statement in summation is simply incorrect. The Court points to one example of the use of that statement, not even for inconsistency, but for omission. Lopez, the prosecutor argued, did not tell Bullard that Nancy yelled "Kill him, kill him, his gun is jammed". The prosecutor went on to argue that Lopez did not say that to Vicky either. One general reference to Bullard, Vicky and the trial testimony was the only other mention of Bullard in the fifty-page summation. Nor did the prosecutor cross-examine Lopez with respect to the Bullard statement. This inconsistencies he pointed out were between direct and cross-examination.

Lopez is that, jealous of Descartes, he went outside for a gun, came back, started a fight, shot and killed Descartes and fled the country. With Bullard's statement and without the other evidence the case is that Descartes picked a fight, went for his gun and was shot. The introduction of that statement could have had no bearing on the verdict. Thus, the anomalous result is that error was found to be harmful based principally on the ground that respondent's subsequent trial testimony went beyond the statement introduced on the direct case. Respondent himself thus was able to vitiate the effect of an inevitable verdict. No view of the harmless error rule can sustain such a result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York, October 6, 1972.

Respectfully submitted,

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Appendix "A".

UNITED STATES COURT OF APPEALS

For the

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of August one thousand nine hundred and seventy-two.

Present: HON. WALTER R. MANSFIELD,
HON. WILLIAM H. TIMBERS,
Circuit Judges
HON. MURRAY I. GURFEIN,
District Judge

UNITED STATES ex rel. GUSTAVO LOPEZ,

Petitioner-Appellee,

v.

JOHN L. ZELKER, Superintendent, Green Haven Correctional Facility, Stormville, N.Y.,

Respondent-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk.
by VINCENT A. CARLIN,
Chief Deputy Clerk.

Appendix "B".

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

72 Civ. 1117

OPINION

UNITED STATES OF AMERICA
ex rel. GUSTAVO LOPEZ,

Petitioner,

against

HON. JOHN L. ZELKER, etc.,

Respondent.

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FRANKEL, D.J.

On June 16, 1967, petitioner shot and killed Michael Descartes. The next day he left for California (and then Mexico), and he did not return to New York until some months later.

Appendix "B".

On July 24, 1967, petitioner was indicted by a New York County grand jury for first-degree murder. A federal arrest warrant was issued for him on December 1, 1967, for unlawful flight to avoid prosecution for murder.

On April 18, 1968, in Queens County, New York, petitioner was arrested by FBI Agent Donald E. Bullard pursuant to the federal warrant. He was warned of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and was taken to FBI headquarters in Manhattan. At FBI headquarters, he was given a form enumerating the *Miranda* rights and announcing a waiver of them. He read it, said he understood, and signed it. He agreed then to give an oral account of the killing, and he did so, but he refused thereafter to sign a written statement.

Lopez did not know at the time that he had already been indicted. He evidently assumed, or hoped, that he would be charged with no more than manslaughter. Agent Bullard, knowing of the outstanding indictment for first-degree murder, did not report this information to petitioner.[1]

Lopez agreed to give a statement to the federal agents. He stated that he had been going with Nancy Soba but they had fought and parted. On the night of the shooting, Lopez went to an "after hours" club at the Shelton Towers Hotel. He stated that he knew that Nancy Soba often went there but that he did not know she would be there that night. Miss Soba was there, and Lopez was conversing with her when Descartes came up to them and started an argument. Fearing that Descartes was going to attack him, Lopez drew his gun and hit Descartes on the head with it. Lopez stated that Descartes then reached for his pocket and, thinking he was going for his gun, Lopez shot him. He then ran downstairs and went to his apartment, where he took the gun apart. The next day, according to the statement reported by Agent Bullard, Lopez drove to the

Triborough Bridge and threw pieces of the gun into the water. Later that morning, Lopez said, he left for California accompanied by Carmen Virruet, with whom he had been living for some months.

Lopez was then brought to this courthouse and taken before a commissioner. The commissioner dismissed the federal charge and turned him over to the state authorities. He was brought to the office of an assistant district attorney, who informed him that he had been indicted for first-degree murder. Lopez exhibited shock upon hearing this, saying he had thought the charge would be manslaughter. He was then given his *Miranda* warnings once more, and he again said that he would make an oral statement but not a written one.

Following a pretrial evidentiary hearing on the admissibility of petitioner's statements, Supreme Court Justice Joseph A. Martinis held that the statement to FBI Agent Bullard was admissible because "the defendant intelligently understood the warnings and knowingly expressed this waiver of his constitutional rights." He held inadmissible the statement made to the assistant district attorney, ruling that "defendant intelligently understood the warnings but did not meaningfully and expressly waive his rights."

At petitioner's trial, the main prosecution witness—the only eyewitness—was Nancy Soba, who stated that she had lived with petitioner intermittently from April 1964 to September 1966; that on the night of the killing, she (with others, including Descartes) first encountered petitioner at a bar, where he threatened to kill her if she did not love him any longer; that petitioner had then left, vowing to return soon. Shortly after 3:30 a.m., she continued, she and Descartes with others, were having a drink at the Shelton Towers club when petitioner reappeared. Petitioner ordered her out; Descartes intervened; Lopez

drew a pistol and struck Descartes with it. As Descartes reached for his bloodied head, she continued, petitioner shot him in the chest, and then, as she tried to hold the victim, petitioner shot him again, in the head. Miss Soba recounted other details after the shooting, including petitioner's threat to kill her, that further buttressed the case for the prosecution.

Lena Gaytan, a member of the party with Nancy Soba, testified that she had been in the ladies' room when she heard two shots fired and that she encountered Nancy upon emerging, then saw petitioner backing down a hallway and waving a gun. Her testimony partly corroborated, partly differed from, Miss Soba's.

Carmen Virruet reported petitioner's return home in the early morning hours of June 16. She testified he told her then he had shot a man who had been with Nancy Soba when petitioner ordered her to leave the club. According to her, petitioner said the victim had started to protest or threaten, had been hit on the head by petitioner, had made motions petitioner construed as reaching for a gun, and had then been shot by petitioner.

The prosecution also proved that parts of a dismantled gun taken from petitioner's apartment were from the murder weapon, contrary to petitioner's statement to Agent Bullard about throwing it off a bridge. The evidence for the state concluded with Agent Bullard's account of that statement in full.

Except for one other witness whose testimony was not of great consequence, the petitioner's testimony for himself was the defense. Petitioner admitted the shooting, but claimed self-defense. He swore that Descartes had been with another man that night in a bar; that both of them had threatened him on prior occasions; that he had know Descartes as a seller of drugs, who carried a gun.

He reported that in the minutes preceding the shooting it was Nancy who had approached him, entreating him to take her home with him; that Descartes came over, intervened, threatened and struck petitioner. Then petitioner swore, he had drawn his gun and struck Descartes, whereupon another man, summoned to help by Descartes, came toward them. Nancy shrieked for Descartes to kill petitioner. Descartes reached inside his coat. Then, petitioner said, he fired. Other details further contradicted the account given by Nancy Soba as well as his reported statements to Carmen Virruet and Agent Bullard.

The jury, on January 23, 1969, found petitioner guilty of murder in the second degree, and he was sentenced to a term of from 25 years to life in prison. The Appellate Division affirmed without opinion, 33 A.D.2d 733.

The affirmance without opinion was in turn affirmed by a 4-3 vote in the New York Court of Appeals, with the Judges of the State's highest court dividing on the issue (the use of the statement of Agent Bullard after indictment) which is now before this court. 28 N.Y.2d 23 (1971). Certiorari was denied on October 12, 1971, 404 U.S. 840.

In his opinion for the Court of Appeals majority, Judge Bergan wrote that petitioner, before giving his statement to the FBI, had been "advised of his right to counsel and his right to remain silent and that any statements made could be used against him. He expressly waived those rights in a written document which he signed." 28 N.Y.2d at 24-25. The majority went on to hold that the evidence supported the finding of a knowing and intelligent waiver. Noting that defendant "was not advised that he had been indicted when the waiver was executed," the Court held this might make a difference if there had been "willful concealment." *Id.* at 26. But there was (and is) no sug-

gestion of such willfulness, although it is undisputed that Agent Bullard knew of the indictment all the while.

Dissenting for himself, Chief Judge Fuld and Judge Burke, Judge Breitel wrote that the majority's ruling "backtracks on [the Court of Appeals own] principle to the effect that a defendant in a pending criminal action is entitled to the advice of a lawyer and that the right may not be waived except in the presence and with the acquiescence of counsel." *Id.* at 26. He put aside as distinguishable "the investigative interrogation of a suspect before a criminal action is instituted"—i.e., the situation to which *Miranda* v. *Arizona* applies. *Id.* Rejecting the justification of waiver, he wrote (*id.* at 28-29):

> "Whatever vitality a waiver rule might have under the *Miranda* doctrine, other considerations require a contrary rule in the area of postarraignment and postindictment interrogation. After criminal action is begun, it is no longer a general inquiry into an unsolved crime but rather a form of pretrial discovery; it is no longer a suspect who is being interrogated but the accused; the interest in affording the police an opportunity to carry on investigatory interrogation for purposes of reaching a decision to charge and in what degree is diminished. In short, the defendant is the all but irrevocable target and the preparation for his trial has begun."

The dissenters would have reversed and ordered a new trial excluding the statements testified to by FBI Agent Bullard "because obtained in a pending criminal action in the absence of counsel and without counsel's consent." *Id.* at 29.

This court holds that the conclusion of the dissent in the New York Court of Appeals must be adopted as a matter of federal constitutional law—specifically, that pe-

titioner's right to due process under the Fourteenth Amendment, as it embodies or "incorporates" the right to counsel under the Sixth, was violated by Agent Bullard's testimony reporting petitioner's post-indictment interrogation and resulting statements.

There is no question that the basic principle of *Massiah* v. *United States*, 377 U.S. 201 (1964), applies here. See also *Beatty* v. *United States*, 389 U.S. 45 (1967) (per curiam); *McLeod* v. *Ohio*, 381 U.S. 356 (1965) (per curiam); *United States* v. *Garcia*, 377 F.2d 321 (2d Cir.), cert. denied, 389 U.S. 991 (1967); *United States* v. *Accardi*, 342 F.2d 697 (2d Cir.), cert. denied, 382 U.S. 954 (1965). The principle, to state it briefly, forbids use at trial of statements elicited from an indicted defendant in the absence of his counsel.[2]

Not questioning that, the State argues that Lopez *waived* this protection when, after the brisk ritual of warnings tendered orally and in writing, he signed a "*Miranda* waiver" (though he refused thereafter to sign anything else). There are wide fissures in this argument.

First, assuming the *Massiah* protection may be waived, which is still a debatable question,[3] the casual and relatively perfunctory invitation to a *Miranda*-style waiver is insufficient. When an indictment has come down, riveting tightly the critical right to counsel, a waiver of that right requires the clearest and most explicit explanation and understanding of what is being given up. There is no longer the possibility—and the law enforcement justification—that a mere suspect may win his freedom on the spot by "clearing up a few things." Cf. *United States* v. *Drummond*, 354 F.2d 132, 144 (2d Cir. 1965) (en banc), cert. denied, 384 U.S. 1013 (1966), rehearing denied, 385 U.S. 892 (1966). Even in the courtroom, where an impartial judicial officer is presumably impelled by no purpose but

fairness, that officer must counsel with care and advise against the likely folly of a layman's proceeding without the aid of a lawyer. *Von Moltke* v. *Gillies*, 332 U.S. 708 (1948); *United States* v. *Spencer*, 439 F.2d 1047 (2d Cir. 1971); *United States* v. *Plattner*, 330 F.2d 271, 276 (2d Cir. 1964). See *United States* v. *Duty*, 447 F.2d 449, 451 (2d Cir. 1971). We cannot settle for less where the waiver has been proposed by a law enforcement officer whose goals are clearly hostile to the interests of the already indicted person in custody.

Furthermore, if a swift and uncounseled waiver could ever be allowed, the one here would remain ineffectual. The State relies, of course, upon what it must show to have been "an intentional relinquishment or abandonment of a known right"—and, specifically, "an *intelligent* waiver of the right to counsel • • •." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) (emphasis added). The petitioner did not know—though his interrogator knew and failed to tell him—that there was already an outstanding indictment for first-degree murder. Lopez must have been aware, to be sure, that he was wanted for the killing of Descartes. But whatever he hoped to accomplish by incriminating statements to a law enforcement officer—including, perhaps, persuasion toward his evident contention that the crime was at most manslaughter—the existence of an indictment was a matter of obvious moment. The very mention of so grave a fact by Agent Bullard might well have had a freezing and silencing impact. Surely, a lawyer, for all his training, would want to know of a circumstance this solemn and definitive before risking incrimination for himself or advising a client on such a risk. It is not persuasive to argue that a layman, because he is more defenseless to begin with, may be held to have achieved an "intelligent waiver" in ignorance of so stark a legal fact.

Appendix "B".

With deference to the New York Court of Appeals majority, it does not seem a sufficient rejoinder to say Agent Bullard was not guilty of "willful concealment." Here, as in other contexts, reliance upon the "subjective good faith" of law enforcers would have the intolerable effect of leaving the safeguards of the Constitution to the vague, variable and partisan "discretion of the police." *Beck* v. *Ohio,* 379 U.S. 89, 97 (1964). The Sixth Amendment protects not merely the right to counsel, but the conjoined right "to be informed of the nature and cause of the accusation * * *." That is not a benefaction to be sought or a prize to be won; it is a *right.* It is sufficient for our purposes that the right—at a critical moment, and without respecting the corollary right to counsel—was ignored while the FBI Agent proceeded to extract from petitioner himself evidence to be used at the trial of the already pending indictment.

Finally, the State argues that if there was error, it was harmless. The contention was not attempted in the state courts, where it is not unfamiliar, e.g., *People* v. *Miles,* 23 N.Y.2d 527, 544 (1969) (Breitel, *J.*) *People* v. *Gonzalez,* 27 N.Y.2d 53, 58 (1970), and none of the 13 state judges concerned with the case has suggested it as a point worth considering. It is, in any event, rejected. The state prosecutor evidently knew full well the reason for his fight to use Agent Bullard's evidence, and he relied heavily upon it in summation.[4] With a single eyewitness of assailable credibility, and with circumstances of a generally sordid character on all sides, it was a potent tactic to nail petitioner's story at the time of apprehension, with the august auspices of an FBI agent, and then score the defense for petitioner's many contradictions of that story on the witness stand. At the least, it is not possible to dismiss lightly what would appear to have been the prosecutor's appraisal at the live trial. Thus, even apart from the

plausible argument that petitioner might not have chosen to take the stand at all but for Bullard's evidence, cf. *Harrison* v. *United States,* 392 U.S. 219 (1968); *United States ex rel. O'Connor* v. *New Jersey,* 405 F.2d 632, 638 n.20 (3d Cir.), cert. denied *sub nom. Yeager* v. *O'Connor,* 395 U.S. 923 (1969), the State fails to carry its burden of showing harmlessness. *Chapman* v. *California,* 386 U.S. 18, 20 (1967).

The petition is granted. Petitioner will be released within 60 days unless he is granted a new trial during that period.

It is so ordered.

Dated: New York, New York, May 12, 1972.

MARVIN E. FRANKEL,

U.S.D.J.

Appendix "B".

FOOTNOTES:

1. This statement reflects what is explicit in the opinion of the New York Court of Appeals though there is room for an argument that the evidentiary record is slightly ambiguous. Lopez clearly took the position that he was not told. Bullard said he "did not recall" whether he had mentioned the indictment. But it is undisputed now that the account given by the New York Court of Appeals is to be accepted as correct for our purposes.

2. We put to one side cases where a person under indictment volunteers, without solicitation, the incriminating information. E.g., *United States* v. *Accardi, supra; United States* v. *DeLoy,* 421 F.2d 900 (5th Cir. 1970); *Coughlan* v. *United States,* 391 F.2d 371 (9th Cir.) cert. denied, 393 U.S. 870 (1968).

   There is no doubt in the instant case that Agent Bullard deliberately elicited what he later reported in his testimony.

3. See *United States* v. *Massimo,* 432 F.2d 324, 327 n. 1 (2d Cir. 1971) (Friendly, *C.J.*, dissenting). And *compare Hancock v. White,* 378 F.2d 479, 482 (1st Cir. 1967), with *United States* v. *Crisp,* 435 F.2d 354 (7th Cir.), cert. denied, 402 U.S. 947 (1971); *Arrington* v. *Maxwell,* 409 F.2d 849 (6th Cir.), cert. denied, 396 U.S. 944 (1969); *United States ex rel. O'Connor* v. *New Jersey,* 405 F.2d 632 (3d Cir.), cert. denied *sub nom. Yeager* v. *O'Connor,* 395 U.S. 923 (1969).

4. Arguing his proof that petitioner had lied, the prosecutor developed the shifts from the statements reported by Carmen Virruet (Vicky) to those reported by Agent Bullard to petitioner's testimony at the trial. He stressed as "the most important thing" the omission from petitioner's out-of-court statements of the assertion at trial that Nancy Soba had yelled at a climactic moment: "Kill him [Lopez], kill him, his gun is jammed."

Appendix "C".

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of September, one thousand nine hundred and seventy-two.

UNITED STATES ex rel. GUSTAVO LOPEZ,

Petitioner-Appellee,

v.

JOHN L. ZELKER, Superintendent, Green Haven Correctional Facility, Stormville, N. Y.,

Respondent-Appellant.

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated August 25, 1972, to stay the issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is granted on condition that the petition for writ of certiorari be filed within 30 days from the date of this order.

WALTER R. MANSFIELD
Walter R. Mansfield, U.S.C.J.

WILLIAM H. TIMBERS
William H. Timbers, U.S.C.J.

MURRAY I. GURFEIN
Murray I. Gurfein, U.S.D.J.

Appendix "D".

COURT OF APPEALS,

STATE OF NEW YORK.

No. 160.

THE PEOPLE &c.,

Respondent,

vs.

GUSTAVO LOPEZ,

Appellant.

BERGAN, J.:

After defendant's indictment in New York County for murder he was arrested by Federal officers on a warrant and made a statement to them concerning the crime. Before the statement was made he was advised of his right to counsel and his right to remain silent and that any statements made could be used against him. He expressly waived those rights in a written document which he signed.

The Trial Court has found, after a hearing on this question, that "the People have proven beyond a reasonable doubt that the defendant intelligently understood the warnings and knowingly expressed his waiver of his Constitutional rights." The evidence in the record supports such a finding.

Defendant does not dispute either the waiver or the sufficiency of the evidence to find that it was intelligently and understandingly made. His argument, is rather, that because he had been indicted when arrested "his waiver was not valid"; and therefore his admission to the Federal officer was inadmissible.

Appendix "D".

It has been held that a statement taken after indictment and before arraignment in the absence of counsel is inadmissible. (*People* v. *Waterman,* 9 N.Y. 2d 561.) Decisions broadly consistent with this are *Massiah* v. *United States* (377 U.S. 201); *McCleod* v. *Ohio* (381 U.S. 356); which applied *Massiah* to State prosecutions; *People* v. *Gunner* (15 N.Y. 2d 266); *People* v. *Meyer* (11 N.Y2d 162); *People* v. *Di Biasi* (7 N.Y. 2d 544); *Spano* v. *New York* (360 U.S. 315).

But these cases upholding the rule that after indictment a defendant may not be questioned without counsel do not decide the question whether the right may be knowingly and intelligently waived. Nor does *People* v. *Miles* (23 N.Y. 2d 527, decide the question, for there defendant had been indicted, arraigned, and had counsel, and the holding was the waiver not in the presence of such counsel would not be recognized.

The principle laid down in *People* v. *Bodie* (16 N.Y. 2d 275), seems controlling here. There the criminal prosecution had been instituted by the filing of an information and the issuance of a warrant. The court's opinion noted that "no valid distinction can be made between a post-indictment and a post-information statement" (p. 279).

The holding was that the right to counsel could be, and there was, waived. The waiver there deemed sufficient was oral (p. 278).

Indeed, the commencement of a criminal proceeding by information and by indictment are logically indistinguishable as far as waiver of counsel is concerned. The rational distinction is between this and the situation where, after arraignment counsel has actually appeared. It has been held that right to counsel may be expressly and knowingly waived at the trial itself. (*People* v. *Higgins,* 23 A.D. 2d 504, affd. 16 N.Y. 2d 751.)

Appendix "D".

Defendant was not advised that he had been indicted when the waiver was executed. If this were a willful concealment it might be considered as undermining the validity of a waiver. But there is no suggestion of that here, and although the Federal officer knew at the time of the interview that defendant had been indicted, he did not recall whether or not he had advised defendant of this.

No prejudice is shown. Defendant certainly knew he was being prosecuted for the murder because he was taken into custody. Whether the prosecution had started with an arrest on probable cause, or on an information, or on an indictment, it was certain to go forward and the right to counsel was just as important to a defendant thus arrested whether or not he had been indicted as far as waiver on interrogation was concerned. There has been no finding of misrepresentation as to the origin of the prosecution.

As for the rest, the record fully supports the conviction of murder in the second degree on testimony by a witness who saw defendant deliberately shoot Michael Descartes to death.

The judgment should be affirmed.

BRETTEL, J. (dissenting).

This case is another in which the court backtracks on its principle to the effect that a defendant in a pending criminal action is entitled to the advice of a lawyer and that the right may not be waived except in the presence and with the acquiescence of counsel. To be distinguished is the investigative interrogation of a suspect before a criminal action is instituted with respect to which the Supreme Court imposed its mandate (*Miranda* v. *Arizona*, 384 U.S. 436).

Appendix "D".

The right to a lawyer in a criminal action is as esteemed and valued a constitutional right as the privilege against self-incrimination (*People* v. *Donovan*, 13 N.Y. 2d 148, 151). Progressively, this court, well in advance of the United States Supreme Court, defined the stage at which a criminal action incepted with the right to counsel, again as distinguished from the investigation which precedes the criminal action (*People* v. *Di Biasi*, 7 N.Y. 2d 544, 549-551 [upon surrender by lawyer after indictment]; *People* v. *Waterman*, 9 N.Y. 2d 561, 564-566 [after indictment without more, in which it was observed that it was not necessary for defendant to insist upon his lawyer's presence]; *People* v. *Meyer*, 11 N.Y. 2d 162, 164-165 [after arraignment before indictment]; *People* v. *Rodriguez*, 11 N.Y. 2d 279, 284 [before adjourned arraignment after information filed]; *People* v. *Bodie*, 16 N.Y. 2d 275 [after warrant issued, but holding counsel could be waived]). The rules were not sparingly but generously applied to protect defendants in full-fledged criminal actions (*People* v. *Malloy*, 22 N.Y. 2d 559, 566-567 [after information but before indictment with purported "waiver" of counsel rejected]; *People* v. *Gunner*, 15 N.Y. 2d 226, 231-232 [prior to arraignment but after information filed and lawyer retained]; *People* v. *Friedlander*, 16 N.Y. 2d 248, 250 [after arraignment in absence of counsel]); *People* v. *Robinson*, 13 N.Y. 2d 296, 301 [excluding statements in the absence of counsel made after a sham vagrancy arraignment]; cf. *People* v. *Paulin*, 25 N.Y. 2d 445, 450).* A quite different rule has been applied, understandably, where unrelated criminal

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* See, also, to similar effect: *People* v. *Reuler*, 17 N.Y. 2d 174, 178; *People* v. *Failla*, 14 N.Y. 2d 178, 180-182, a particularly spirited defense of the right to counsel, but compare conc. op. as to waiver at p. 183.

charges are involved and counsel has not been retained or a criminal action begun in the matter in relation to which the statements were obtained (*People* v. *Simons*, 22 N.Y. 2d 533, 539; *People* v. *Stanley*, 15 N.Y. 2d 30, 32-33).

In due order the court in a pre-indictment but post-arrest situation, held that where a lawyer "enters the proceeding, the police may not question the defendant in the presence of the attorney, of the defendant's right to counsel" (*People* v. *Arthur*, 22N.Y. 2d 325, 329). Even the failure to object to the admissions being used in evidence was held immaterial because there was involved a "deprivation of a fundamental constitutional right" (*id.*). Indeed, a short time before, the court had held that a defendant could not "waive" his right to counsel when questioned about a crime related to that on which he had been arraigned and had counsel (*People* v. *Vella*, 21 N.Y. 2d 249, 251; *contra*, *People* v. *Bodie*, supra, thus constituting the first time that the *Bodie* case was qualified, see *infra*). A unanimous court, except for the Chief Judge who concurred in result only, accepted a plain and unqualified restatement of these principles (*People* v. *Miles*, 23 N.Y. 2d 527, 542; cf. *People* v. *Stephen J.B.*, 23 N.Y. 2d 611, 616). Strangely, in the light of other developments to be described shortly, the court again agreed quite recently upon a restatement of these principles (*People* v. *Hetherington*, 27 N.Y. 2d 242, 244-245).

Having marched up the mountain, the direction has been reversed and the march is now evidently downhill. In *People* v. *Stockford* (24 N.Y. 2d 146), in omen of the shift, it was said that:

> "This court has held the issuance of a warrant is the commencement of a criminal proceeding (*People* v. *Bodie*, 16 N.Y. 2d 275; *People* v. *Malloy*, 22 N.Y. 2d

539) but this stage of the proceeding has not yet been fully equated to that which would exist where, after arraignment and the appearance of counsel in a court, the police attempted to question a defendant not in the presence of that counsel. (See, e.g., *People* v. *Di Biasi*, 7 N.Y. 2d 544, where after indictment defendant had been surrendered by counsel who appeared for him; *Spano* v. *New York*, 360 U.S. 315, revg. 4 N.Y. 2d 256; and *People* v. *Gunner*, 15 N.Y. 2d 226, where the indictment was regarded as part of a formally instituted criminal action.) Nor may an information used to obtain an arrest warrant be regarded as the equivalent of the formal triable document which initiates a misdemeanor prosecution. (See, e.g., *People* v. *Jeffries*, 19 N.Y. 2d 564, 566-567.) To this extent we qualify our holding in *People* v. *Bodie*, (*supra*, pp. 278-279.)

Then, of course, came *People* v. *Robles* (27 N.Y. 2d 155, 159-160) in which the attenuated theory of waiver is strained further and the rule in the *Arthur* case, *supra*, is emaciated beyond recognition. Now, there is this case, based on waiver, with resurrection of the much-qualified *Bodie* case, *supra*.

Whatever vitality a waiver rule might have under the *Miranda* doctrine, other considerations require a contrary rule in the area of post-arraignment and post-indictment interrogation. After criminal action is begun, it is no longer a general inquiry into an unsolved crime but rather a form of pretrial discovery; it is no longer a suspect who is being interrogated but the accused; the interest in affording the police an opportunity to carry on investigatory interrogation for purposes of reaching a decision to charge and in what degree is diminished. In short, the defendant is the all but irrevocable target and the preparation for his trial has begun.

Appendix "D".

In permitting a theory of waiver of counsel by an uncounselled defendant held incommunicado to be imported into this stage of the proceedings, not only is the right to counsel debased or negated, but, perhaps even worse, the self-restraining and wise self-discipline of *stare decisis* is trod under by distinctions of gossamer thinness and transparency.

Putting aside jurisprudential principles, the practical effect is unfortunate. It seems elementary that in the protection of individuals (even in civil matters, let alone in criminal matters) waivers obtained in a pending action in the absence of counsel are, in truth, a denial of the right to counsel in that action. The denial is the more egregious where counsel is already retained or assigned, but the frustration of the right may be as grave if the waiver comes on the very eve of the inevitable retainer or assignment of counsel as is now the case in criminal actions. Lip service is paid to the right, to be sure, and counsel will be provided, but not until persons, already defendants in criminal actions, have first confessed under the most transparently manipulated "voluntary" waivers of "known rights." Surely, if Mr. Justice Jackson was right that no lawyer worth his salt would advise a suspect to talk without counsel present,* no lawyer would permit his client in a criminal action to confess in the lawyer's absence.

It is difficult to perceive what public policy is served by such mercurial shifts in the interpretation of constitutional principles, or what benefit there is to the protection of the public or the individuals of which it is composed. Even legislative policy is more stable than that. Stable rules of law protect all even if at different times they would seem to deny "rights" to defendants or "protection" to the public.

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* *Watts* v. *Indiana*, 338 U.S. 49, 59.

Accordingly, I dissent and vote to reverse the judgment of conviction and to order a new trial on the ground that the confession obtained after indictment was not admissible because obtained in a pending criminal action in the absence of counsel and without counsel's consent.

• • • • • •

Judgment affirmed. Opinion by Bergan, J. All concur except Breitel, J., who dissents and votes to reverse in an opinion in which Fuld, Ch. J., and Burke, J., concur.